Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-125

GETTY OIL COMPANY,
Appellant,

VERSUS

OKLAHOMA TAX COMMISSION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF OKLAHOMA

JURISDICTIONAL STATEMENT

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GETTY OIL COMPANY,
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Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

JURISDICTIONAL STATEMENT

Appellant appeals from the opinion and judgment of the Supreme Court of the State of Oklahoma, entered on February 1, 1977, affirming an Order entered by the Oklahoma Tax Commission, and from the decision of that court denying Appellant's Petition for Rehearing, entered April 26, 1977, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Oklahoma is reported in 563 P.2d 627. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was initially brought by Appellant pursuant to 68 O.S. 1971, § 225, to set aside Order No. 62195 of the Oklahoma Tax Commission denying the protest of Appellant to an additional assessment of income tax on losses incurred by Appellant during prior years and disallowed by the Oklahoma Tax Commission as a carry-over deduction. Oklahoma Tax Commission Order No. 62195 was entered on June 17, 1975, and Notice of Intention to Appeal was filed with the Oklahoma Tax Commission on June 26, 1975. Appellant filed its Petition in Error with the Supreme Court of the State of Oklahoma, perfecting its appeal from Order No. 62195, on July 16, 1975. The judgment of the Supreme Court of the State of Oklahoma was entered on February 1, 1977, affirming Order No. 62195 of the Commission, and Appellant's Petition for Rehearing was denied on April 26, 1977. Notice of Appeal, as set forth in Appendix B hereto, was filed in the Supreme Court of the State of Oklahoma on July 12, 1977. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by 28 U.S.C. § 1257(2), 62 Stat. 929. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920); *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770 (1928); *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 65 S.Ct. 624, 89 L.Ed. 857 (1945); *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 69 S.Ct. 1291, 93 L.Ed. 1544 (1949); and *WHYY* v. *Glassboro*, 393 U.S. 117, 89 S.Ct. 286, 21 L.Ed.2d 242 (1968).

In the event the Supreme Court does not consider appeal the proper mode of review, Appellant requests that the papers whereupon this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, 76 Stat. 556.

STATUTES INVOLVED

The validity of 68 O.S. 1971, § 2358(A)(3) is here involved. Sections 353(3), (10), (11), (12) and (13); and 2358(A)(3) of the Oklahoma Income Tax Act, 68 O.S. 1971, are set forth in Appendix C hereto.

QUESTION PRESENTED

Is there a denial of equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution when an Oklahoma statute is applied in such a manner that a loss carry-over deduction is made available to a taxpayer engaged in business operations only in Oklahoma but denied to a taxpayer such as Appellant who is engaged in multi-state operations?

STATEMENT

Getty Oil Company (hereinafter "Getty") which engages in the oil production business throughout the United States and in numerous foreign countries has been denied a net operating loss carry-over deduction in Oklahoma, although a taxpayer operating a business solely in Oklahoma would have received the net operating loss carry-over deduction. The Oklahoma Supreme Court and the Oklahoma Tax Commission (hereinafter "Tax Commission") so construed the Oklahoma statute involved, despite Getty's consistent argument that this construction of the statute would be repugnant to the Fourteenth Amendment. The Oklahoma Supreme Court stated:

> "It is agreed that net operating loss carry-over deductions are allowed in Oklahoma where a taxpayer is allowed the deduction on his federal return. Getty claims the position advocated by Commission will generate a situation of unconstitutional statutory construction. It asserts allowing a carryover deduction to a taxpayer whose business is operated solely in Oklahoma, but not to a taxpayer who derives part of his income from other states, creates unconstitutionally arbitrary discrimination against nonresident taxpayers in the position of Getty, citing *Graham* v. *State Tax Commission*, 48 A.D.2d 44, 369 N.Y.S.2d 863 (1975). We do not agree." 563 P.2d at p. 631.

Getty is a Delaware corporation qualified to do business in Oklahoma. In compliance with Section 2358(A)(3)(a) of the Oklahoma Income Tax Act, it has consistently reported its Oklahoma net income on the separate allocation accounting method. That is, the net income from its business activities conducted solely in Oklahoma is reported

separately and apart from its net income from its business activities outside Oklahoma. Getty's Oklahoma net income (or net loss) for each of the taxable years 1966 through 1971 was:

YEAR	NET INCOME	NET LOSS
1966		($1,020,165.02)
1967		(1,968,399.46)
1968		(1,063,770.70)
1969		(593,004.43)
1970		(270,949.17)
1971	$1,451,604.57	
TOTAL:	$1,451,604.57	($4,916,288.78)

In calculating its 1971 Oklahoma net income for the purpose of completing its Oklahoma Corporation Income Tax Return for 1971, Getty carried forward its 1966 and 1967 Oklahoma net operating losses and deducted those amounts pursuant to Section 2358(A)(3)(c) and (d) of the Oklahoma Income Tax Act. Following the audit of Getty's 1971 Oklahoma Corporation Income Tax Return by Tax Commission, Getty was notified that its Oklahoma net operating loss carry-over deduction was not allowable because no net operating loss carry-over deduction was reflected on its federal income tax return.[1] By its letter to Getty dated November 15, 1972, Tax Commission notified Getty that it proposed to assess additional Oklahoma income tax for 1971. Getty filed its protest to the proposed assessment on April 16, 1973, and requested an oral hearing before

[1] Net income outside Oklahoma had absorbed the Oklahoma net losses during the taxable years 1966-1971 for federal income tax purposes.

Tax Commission. The hearing before Tax Commission was held on September 27, 1973; the Brief of Getty was filed with Tax Commission at that time.

In its Protest to Tax Commission, dated April 16, 1973, in response to Tax Commission's determination that a deficiency existed with respect to taxes paid by Getty for the 1971 taxable year, Getty first challenged the action of Tax Commission on constitutional grounds:

> "Substantial constitutional questions are also raised by the literal language of the statute. The auditor contends that the statute requires a direct allocation of income but allows a net operating loss deduction only if a net operating loss exists for federal income tax purposes as a result of combining the income from all states. *It has been held that a tax law will be struck down as a violation of the Fourteenth Amendment to the United States Constitution if the state's action is palpably arbitrary or grossly unequal in its application to the taxpayers concerned.*" (Emphasis supplied.)

In Getty's Brief filed in connection with the oral hearing held before Tax Commission, the constitutionality of § 2358(A)(3)(c) and (d) as applied by Tax Commission was attacked for the reason that it arbitrarily discriminates against Getty and deprives Getty of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution. Getty noted that § 2358(A)(3)(d), as applied by Tax Commission, effectively denies a net operating loss deduction for Oklahoma state income tax purposes in those instances in which a taxpayer engaged in business operations in states outside Oklahoma realizes net income in those other states sufficient to absorb an Oklahoma net operating loss. At this early stage in the

proceedings, Getty drew in question the validity of the state statute on the ground that, as applied to the facts in the instant case, that statute is repugnant to the Constitution of the United States for the reason that it discriminates improperly against taxpayers having income in states other than Oklahoma, whether they be Oklahoma residents or non-residents. The discrimination could not be defended by Tax Commission as reasonable in nature for the reason that it is not based on any legitimate classification between residents and non-residents and/or taxpayers engaged in business operations solely within Oklahoma and those engaged in multi-state operations.

Tax Commission rejected the above argument and denied the Protest of Getty in its Order No. 62195, dated June 17, 1975. In overruling the Protest of Getty, Tax Commission sustained the validity of § 2358(A)(3)(c) and (d) as applied, despite the fact that Getty had drawn in question the validity of that state statute on the ground of its being repugnant to the United States Constitution.

Getty then filed its Notice of Intention to Appeal with Tax Commission on June 26, 1975. Tax Commission notified Getty of the amount of additional income tax assessed ($58,064.13) and the interest accrued through June 17, 1975, ($11,032.19) by its letter to the attorney for Getty dated July 2, 1975. As required by statute, Getty paid the additional income tax and interest to Tax Commission and gave notice that such sum was being paid as a condition precedent to the right of Getty to appeal to the Supreme Court of Oklahoma and that such sum should be held by Tax Commission in a segregated fund pending the final determination of the appeal. Getty filed its Petition in Error

with the Supreme Court of Oklahoma on July 16, 1975, perfecting its appeal from Order No. 62195 of the Oklahoma Tax Commission.

Getty's Petition in Error, attached hereto as Appendix D, challenged both the construction and application of § 2358(A)(3) adopted by Tax Commission for, *inter alia*, the following substantive reason:

* * * * * *

> "(c) The construction prevents uniform operation of the Oklahoma Income Tax Act and does not lay the burden of the income tax uniformly on all those similarly situated; therefore, Section 2358(A)(3) arbitrarily discriminates against the Taxpayer and is unconstitutional and void."

Furthermore, Getty asserted in its Motion for Oral Argument filed with the Supreme Court of Oklahoma on October 15, 1975, attached hereto as Appendix E, that the issue raised by Getty's challenge of § 2358(A)(3) was of substantial public significance because Tax Commission's interpretation of § 2358(A)(3), if adopted by the Supreme Court of Oklahoma, would be unconstitutional in its application to Getty.

Consistent with its pattern of raising the issue at every procedural opportunity available to Getty in, first, objecting to the additional assessment of Tax Commission, and later, appealing the denial by Tax Commission of Getty's formal Protest, Getty asserted to the Supreme Court of Oklahoma that § 2358(A)(3) ". . . arbitrarily discriminates against Taxpayer and is, therefore, unconstitutional and void." In its Brief, Getty employed various hypotheticals, never controverted by Tax Commission, which demonstrated that

had Getty incurred losses in all the states in which it operated during the relevant time period, the Oklahoma deduction would have been permitted because the aggregate allocable net operating loss deduction would have equaled the federal net operating loss deduction. Because Getty's operations in states other than Oklahoma produced income sufficient to absorb the Oklahoma net operating losses, no federal net operating loss deduction was available ["allowed" under § 2358(A)(3)(d)] to Getty even though Oklahoma operations during that time produced a net operating loss.[2] Under these facts, it was and is the contention of Getty as stated in its Brief to the Supreme Court of Oklahoma that § 2358(A)(3)(c) and (d) ". . . discriminates improperly against taxpayers who have income in states other than Oklahoma, whether they be Oklahoma residents or non-residents. This discrimination is not based on any reasonable classification and fails to operate with reasonable uniformity and equality on the given classes of taxpayers." Accordingly, Getty urged that Tax Commission's application of § 2358(A)(3)(c) and (d) denied Getty the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

As support for the foregoing argument, Getty cited the decision of the Supreme Court of New York (Appellate Division, Third Judicial Department) in *Graham* v. *State Tax Commission*, 369 N.Y.S.2d 863, *aff'd*, 389 N.Y.S.2d 362, 357 N.E.2d 1017 (1975). Confronted with facts and a state statute remarkably similar to that which was before the Supreme Court of Oklahoma in the instant case, the New

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[2] This net operating loss was shown by Getty to be non-deductible in all other states in which Getty engaged in business activities.

York court sustained the position of the appellant-taxpayer that the statute, as applied by the New York State Tax Commission, "allocates income and not losses and, therefore, discriminates against non-residents who have New York income and that this discrimination is both inequitable and in conflict with statutory and constitutional safeguards." The New York court held that the regulation was "unreasonable, arbitrary or capricious and, therefore, invalid," refuting the State Tax Commission's position that the need for "federal conformity" in administering the state income tax statutes was a sufficient basis upon which to reasonably conclude otherwise.

Getty never asserted that § 2358(A)(3)(d), as enacted by the Oklahoma Legislature, is void in its entirety on its face. In fact, throughout the proceedings leading to this appeal Getty has suggested the proper manner of construing § 2358(A)(3)(c) and (d) together so that there is generated a fair and equitable result treating alike all Oklahoma taxpayers similarly situated. Such a construction would have avoided the constitutional issue here involved. These arguments were rejected by the Supreme Court of Oklahoma. In its Petition for Rehearing filed with the Supreme Court of Oklahoma, Getty specifically denied the power of the Oklahoma Legislature to enact a statute which denied a net operating loss deduction to that class of taxpayers of which Getty is a member while providing it to other taxpayers doing business in Oklahoma in an identical manner and with identical results. Getty asserted that the Oklahoma Legislature could reasonably and constitutionally only have intended that § 2358(A)(3)(c) generally allow the net operating loss deduction and that Subsection (d)

simply limit that deduction to those losses actually incurred by a taxpayer in Oklahoma business activities. Getty has consistently argued and does now contend that § 2358(A)(3), as applied to the facts presented, does discriminate in an invidious manner against Getty. As was held in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 42 S.Ct. 106, 66 L.Ed. 239 (1921), it is sufficient to invoke the jurisdiction of this Court if there is presented a claim that a state statute is invalid as applied to a particular situation. Here, Getty has maintained from the beginning that § 2358(A)(3), as applied to a taxpayer which has incurred operating losses in its Oklahoma business activities but which has sufficient income from operations in other states to absorb the Oklahoma losses so that no net operating loss deduction is reflected on its federal income tax return, is unreasonable, arbitrary and discriminatory, and void as a denial of equal protection of the laws under the Fourteenth Amendment.

As has been demonstrated, Getty has taken advantage of every procedural opportunity during the course of its adversary relationship with Tax Commission in connection with the protested assessment to assert that the application of the statute in question to its particular circumstances renders that statute null and void under federal law. *Jett Brothers Distilling Co.* v. *Carrollton*, 252 U.S. 1, 40 S.Ct. 255, 64 L.Ed. 421 (1920). Moreover, when it appears from the opinion of the state court of last resort that a state statute was drawn in question on the ground of its being repugnant to the Federal Constitution, and the decision of that court sustains the validity of that state statute, this Court has jurisdiction on appeal and need not inquire as to the manner in which such question was raised below.

See *Raley* v. *Ohio*, 360 U.S. 423, 436, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959); *Charleston Federal Savings & Loan Ass'n* v. *Alderson*, 324 U.S. 182, 185, 186, 65 S.Ct. 624, 89 L.Ed. 857 (1945); *Saltonstall* v. *Saltonstall*, 276 U.S. 260, 267, 268, 48 S.Ct. 225, 72 L.Ed. 565 (1928). That the Supreme Court of Oklahoma recognized Getty's argument that the state statute in question is repugnant to the United States Constitution is clearly evidenced by reference to the quotation from the opinion of the Supreme Court of Oklahoma appearing on page 4, *supra*.

In affirming the decision of Tax Commission, the Supreme Court of Oklahoma expressly sustained the validity of the state statute, as construed and applied, which had been drawn in question by Getty on the ground of its being repugnant to the United States Constitution. In its opinion, that court denied that the construction of the state statute "creates unconstitutionally arbitrary discrimination against nonresident taxpayers in the position of Getty. . ." In so ruling, the Oklahoma court did not purport to place even implicit reliance upon any doctrine of state law which might arguably serve as an adequate state ground upon which its judgment might rest. Given the critical fact that the Oklahoma court decided the federal question on its merits, this Court has jurisdiction to review the judgment of the Supreme Court of Oklahoma insofar as that judgment decides that the state statute challenged by Getty is not in fact void on the ground of its being repugnant to the Constitution of the United States. *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961). The Oklahoma Supreme Court, with one justice dissenting, has rejected Getty's argument that the state statute, as applied,

conflicts with the Equal Protection Clause of the Fourteenth Amendment; this determination calls for the independent consideration and decision of the Supreme Court of the United States. *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770 (1928).

THE FEDERAL QUESTION IS SUBSTANTIAL

The issues involved in this appeal are of general public interest. Numerous other Oklahoma taxpayers who engage in business activities both within and without the State of Oklahoma are seriously concerned with the ruling of the Oklahoma Supreme Court and are adversely affected thereby. It is probable that many of the taxpayers so harmed are not economically able to present their claims in the procedural manner prescribed by the Oklahoma Legislature. It is conceivable that some businesses presently operating outside Oklahoma will not venture into the State if there is foreseen the likelihood that initial operations in Oklahoma will not be profitable; such businesses will be at a distinct competitive disadvantage with businesses operating solely within Oklahoma in an identical manner and with identical results for the reason that the former will be denied the tax benefits accorded to their competitors operating solely within the State. The ramifications of the opinion and judgment of the Oklahoma Supreme Court are of critical importance, to-wit: to what extent may a state enact tax legislation which creates a distinction between taxpayers doing business solely within that state and taxpayers doing business outside the state as well? For these reasons the question presented is so substantial as to require

plenary consideration of this Court, with briefs on the merits and oral argument for its resolution.

Under § 2358(A)(3)(c) and (d), as construed and applied by Tax Commission and the Supreme Court of Oklahoma, if a taxpayer has operating losses in all states in which it operates, that taxpayer will be permitted a proration of those losses to the extent they are attributable to business conducted in Oklahoma, because the aggregate of allocable net operating loss deductions attributable to each state will equal the federal net operating loss deduction. Also, if a taxpayer operates solely within Oklahoma and incurs operating losses, it will be permitted a net operating loss deduction equal to that claimed on its federal income tax return. On the other hand, if a taxpayer engages in operations in states outside Oklahoma, and those operations produce income sufficient to absorb Oklahoma net operating losses, there will be no federal net operating loss deduction reflected on the taxpayer's federal income tax return, even though Oklahoma operations produced a net operating loss, and the taxpayer will be denied a net operating loss deduction in Oklahoma. This last result discriminates improperly against taxpayers who have income in states other than Oklahoma, whether they be Oklahoma residents or non-residents. This discrimination is not based on any reasonable classification and fails to operate with reasonable uniformity and equality on the given classes of taxpayers.

In order for a discriminatory state tax statute to be upheld, the discrimination must be "founded upon a reasonable distinction, or difference in state policy not in conflict with the Federal Constitution." *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 527, 528, 79 S.Ct. 437, 3 L.Ed.2d 480

(1959). The classification unavoidably created as a result of the recognized distinction "must rest upon some ground or difference having a fair and substantial relation to the object of the legislation." *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920). See *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770 (1928); *Air-Way Electric Appliance Corp* v. *Day*, 266 U.S. 71, 85, 45 S.Ct. 12, 69 L.Ed. 169 (1924). But here the discriminatory result is not redeemed by any reasonable classification or distinction.

Pursuant to the decision here appealed, a distinction has been drawn in the class of taxpayers doing business within Oklahoma which have incurred net operating losses between those taxpayers which do business exclusively in Oklahoma and those taxpayers which also do business outside the State. No explanation has been suggested by Tax Commission to either Getty or the Supreme Court of Oklahoma as to the reason for the difference in tax treatment resulting from that classification. No legislative history or statement of purpose is discernible which would justify the discriminatory classification. No enlightenment has been provided by Tax Commission in its Brief to the Supreme Court of Oklahoma which explains the peculiarity of why two businesses operating in an identical manner and with identical results in Oklahoma are not afforded identical tax benefits and burdened with identical tax obligations by the State.

This Court has frequently reviewed state court decisions involving state tax legislation distinguishing between residents and non-residents with respect to tax benefits afforded and burdens imposed by the states. Of course, the

instant case does not involve *per se* the difference in treatment under § 2358(A)(3)(c) and (d) between a resident taxpayer and a non-resident taxpayer. This distinction was unfortunately and inexplicably seized upon by the Supreme Court of Oklahoma in distinguishing the New York *Graham* decision, *supra*, cited by Getty as being authority precisely on point with Getty's contention that Tax Commission's position in connection with the construction and application of the statute was arbitrary and discriminatory. The Oklahoma statute is arbitrary in application because it rests upon the scope of business activities of the taxpayer; it treats differently and for no discernible reason a taxpayer which incurs net operating losses while engaged in business solely within Oklahoma and a taxpayer operating within Oklahoma with identical business results, but which second taxpayer also has income from operations outside Oklahoma which fortuitously absorbs the Oklahoma losses.

The arbitrary nature of the distinction especially manifests itself in the fact that Getty is statutorily compelled to adhere to the separate allocation method of reporting income for state income tax purposes. The multi-state/single-state classification endorsed and affirmed by the Supreme Court of Oklahoma is certainly no less invidious or arbitrary in its discrimination toward taxpayers similarly situated than is the resident/non-resident distinction often condemned by this Court as a denial of equal protection of the laws. Both instances involve a classification which is arbitrary. Both instances suggest a need to guard against bias and discrimination which may be incorporated into the taxation statutes and regulations of a state, whether that incorporation of bias and discrimination be intentional or inadvertent.

In *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989 (1920), this Court was confronted with a Virginia taxation statute providing that domestic corporations doing business wholly outside the state were exempt from state income taxes, while domestic corporations doing business both within and without the state were required to pay a tax on income derived not only from business transacted within the state, but also from that business transacted outside the state. A domestic corporation doing business both within and outside Virginia challenged an assessment of income tax based in part on income earned from business activities conducted outside the state on the ground that the authorizing statute denied to that taxpayer the equal protection of the laws in violation of the Fourteenth Amendment. This Court noted that a classification created for taxation purposes must be reasonable, "and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 253 U.S. at 415. While conceding that all tax laws creating classifications are to a greater or lesser extent discriminatory, this Court warned that a tax law nevertheless cannot be sustained if the classification appears to be illusory. In holding the Virginia tax law arbitrary and discriminatory in violation of the Fourteenth Amendment, it was stated:

> "It is obvious that the ground of difference upon which the discrimination is rested has no fair or substantial relation to the proper object sought to be accomplished by the legislation. *It follows that it is arbitrary in effect; and none the less because it is probable that the unequal operation of the taxing system was due to inadvertence rather than design.*" 253 U.S. at 416. (Emphasis supplied.)

In *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562, 69 S.Ct. 1291, 93 L.Ed. 1544 (1949), this Court reviewed an Ohio tax statute which discriminated in favor of Ohio residents and against the residents of other states. The challenged Ohio statute exempted from taxation certain accounts receivable owned by residents of the state but taxed those owned by non-residents. The express purpose of the Ohio statute was to proffer to other states the right to tax accounts receivable owned by residents of Ohio that derived from sale of Ohio goods negotiated and consummated in such other states in exchange for the reciprocal right of Ohio to similarly tax the residents of those states proffered that right. In rejecting the reciprocity argument, this Court noted that the statutes, on their face, were admittedly discriminatory against non-residents, and that taxpayers were treated differently for the sole reason of their residence either within or without the taxing State. Citing a line of cases dealing with the determination of ad valorem tax bases for property of foreign corporations located within a taxing state, the Court observed that although a state may arbitrarily decline to admit foreign corporations to carry on intrastate business within its borders, and may exact fees and require licenses for the privilege of transacting business within that state, nevertheless, after that state has elected to permit a business to engage in commercial activities there, that business is then entitled to equal protection with the state's own domestic corporations. Because the incidence of the Ohio state tax in *Wheeling Steel Corp.* turned on the status of residency of the taxpayer, the Supreme Court struck down that statute as violating the Equal Protection Clause of the Fourteenth Amendment.

Although the nature of the tax benefit withheld from Getty is different from that denied appellant in the *Wheeling Steel Corp.* decision, and the discrimination inherent in the classification distinguishing multi-state businesses and single-state businesses is far more subtle than the resident/non-resident classification of the Ohio statute, the adverse and arbitrary result to Getty is nevertheless analogous and no less burdensome or inequitable to other taxpayers similarly situated.

In a separate concurring opinion written in *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 530, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959), Mr. Justice Brennan explained the Supreme Court's holding in the *Wheeling Steel Corp.* case. Mr. Justice Brennan observed that one of the historic roles of the Equal Protection Clause of the Fourteenth Amendment has been to maintain the principle of federalism in connection with multi-state commercial activities engaged in by the many business entities having contacts with more than one state. When the Equal Protection Clause operates in this manner, it becomes an "instrument of federalism." 358 U.S. at 532. He added:

> ". . . [I]n the case of an ad valorem property tax, *Wheeling* teaches that a distinction which burdens the property of nonresidents but not like property of residents is outside the constitutional pale." 358 U.S. at 532, 533.

Of course, when the Equal Protection Clause is viewed in this light, it is no longer permissible to sustain the validity of a state statute simply because a set of facts reasonably can be conceived that would sustain that statute. This incongruity exists because it can be argued that even an

avowed state policy favoring resident taxpayers over non-resident taxpayers by offering certain tax advantages to residents not made available to "foreign" competition is not wholly without rational ground or purely arbitrary. However, such policy is not compatible with the principle of federalism which serves as the bedrock of our Federal Constitution. The Constitution denies to the individual states the power to discriminate in favor of its own residents against and at the expense of residents of other state members of the federation. Getty asserts that multi-state business operations should be afforded similar protection and benefits made available under the Fourteenth Amendment to non-resident corporations.

In *WHYY* v. *Glassboro*, 393 U.S. 117, 89 S.Ct. 286, 21 L.Ed.2d 242 (1968), the Court reversed a New Jersey decision denying a non-New Jersey corporation a statutory exemption from certain property taxes. New Jersey had denied the exemption, even though the taxpayer satisfied all factual prerequisites in qualifying for the exemption under the pertinent state statute, on the ground that the statute exempted only business entities incorporated in New Jersey. This Court held that this classification was contrary to the Equal Protection Clause of the Fourteenth Amendment.

Again, the nature of the tax statute reviewed in *WHYY* v. *Glassboro, supra,* was different from the statute challenged here by Getty, and the resident/non-resident classification created by the New Jersey statute was less subtle than the multi-state/single-state business operations classification resulting from § 2358(A)(3). However, the critical analysis in the cited case of the approach taken by

the New Jersey courts in sustaining the validity of that statute is well adapted to review of the Oklahoma statute here in quesion. The New Jersey tax exemption was not withheld from appellant in *WHYY* v. *Glassboro* because appellant had failed to show that it was able to benefit the taxing state in the same manner as a domestic corporation. Nor had the New Jersey Supreme Court or the state taxing authority suggested that there was any greater administrative burden in evaluating a foreign corporation than a domestic corporation under New Jersey law. Very similarly, neither the Oklahoma Supreme Court nor Tax Commission has ever asserted that Getty is not entitled to the tax benefit offered single-state operations because of any serious administrative burden which would otherwise result.

As in *WHYY* v. *Glassboro*, Getty has not been accorded equal treatment with other taxpayers similarly situated. There is no contention that the Oklahoma deduction was denied to Getty because of any difference in the character of its operations in Oklahoma from that of other taxpayers operating solely in Oklahoma. This inequality of treatment results from the multi-state/single-state classification which is wholly unreasonable under the circumstances. Because of the unusual nature of this discrimination, this Court should assume jurisdiction to determine whether the classification invoked in Oklahoma is precluded by the Fourteenth Amendment to the United States Constitution. See *Morey* v. *Doud*, 354 U.S. 457, 464, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957); *Louisville Gas & Electric Co.* v. *Coleman*, 277 U.S. 32, 37, 38, 48 S.Ct. 423, 72 L.Ed. 770 (1928).

CONCLUSION

For the foregoing reasons Getty's appeal from the opinion and judgment below should be granted.

Respectfully submitted,

BRUCE H. JOHNSON
*L. E. STRINGER
RANDALL D. MOCK
STEVEN L. BARGHOLS
1700 Liberty Tower—100 Broadway
Oklahoma City, Oklahoma 73102
Counsel for Appellant

July, 1977

* Counsel upon whom service is to be made.

APPENDICES

APPENDIX A

GETTY OIL COMPANY, Appellant,
v.
OKLAHOMA TAX COMMISSION,
Appellee.

No. 48698.

Supreme Court of Oklahoma.

Feb. 1, 1977.

As Corrected April 21, 1977.

On Rehearing April 26, 1977.

Taxpayer appealed from decision of Tax Commission denying protest to additional assessment of income tax on carryover losses from prior years. The Supreme Court, Doolin, J., held that legislature did not intend to create deduction by enacting carryover loss deduction provision, but to limit one already reflected on federal return, that such provision did not create unconstitutionally arbitrary discrimination against nonresident taxpayers, and that provision did not constitute indirect tax on income from sources outside state.

Affirmed.

Simms, J., concurred in result.

Hodges, C. J., dissented and also dissented on rehearing.

* * * * * *

Appeal from Oklahoma Tax Commission.

Taxpayer Oil Company appeals from decision of Oklahoma Tax Commission denying its protest to additional assessment of income tax on carryover losses from prior years disallowed as a deduction by Tax Commission.

Bruce H. Johnson, Randall D. Mock, James H. Holloman, Jr., Crowe, Dunlevy, Thweatt, Swinford, Johnson & Burdick, Oklahoma City, for appellant.

Donald B. Nevard, Gen. Counsel, Stanley J. Alexander, Clyde E. Fosdyke, and F. Karen Grethen, Oklahoma City, for appellee.

DOOLIN, Justice.

Getty Oil Company (Getty) is a Delaware Corporation engaged primarily in oil production throughout the United States and other countries, qualified to do business in Oklahoma. Getty paid, under protest, an additional assessment of $58,000.00 in Oklahoma income taxes for the taxable year of 1971. Getty was disallowed a carryover deduction claimed on its 1971 Oklahoma tax return for net operating losses sustained in the previous five years. The Oklahoma Tax Commission (Commission) after a hearing denied the protest and Getty appeals.

Prior to 1971, Oklahoma did not allow a taxpayer to claim a deduction for a net operating loss carried over from a previous year. Effective in 1971, Oklahoma adopted the "Oklahoma Income Tax Act" which incorporated as a base for Oklahoma income taxation, the United States Internal Revenue Code. The Int.Rev.Code of 1954 § 172 permits a deduction for carryovers of net operating losses for the prior five year period. 68 O.S.1971 § 2353(12), (13) provide:

> 12. "Oklahoma taxable income" means "taxable income" as reported (or as would have been reported by the taxpayer had a return been filed) to the federal government, and in the event of adjustments thereto by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided;
>
> 13. "Oklahoma adjusted gross income" means "adjusted gross income" as reported to the federal government (or as would have been reported by the taxpayer had a return been filed), or in the event of adjustments thereby by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided;

The further adjustments referred to in these statutes are enumerated in 68 O.S. 1971 § 2358. Those parts material to this appeal are as follows:

> § 2358 "*Adjustments to arrive at Oklahoma taxable income and Oklahoma adjusted gross income.* A. Taxable income and, where use of adjusted gross income is necessary (i.e. required by this act), adjusted gross income shall be adjusted as follows to arrive at Oklahoma taxable income and Oklahoma adjusted gross income:
>
> 1. There shall be added * * *
>
> 2. There shall be deducted * * *
>
> 3. Net income (or loss) from a business activity, which is not a part of business carried on within and without the state of a unitary character, shall be separately allocated to the state in which such activity is conducted. Items of the following nature shall be allocated as indicated:
>
> a. *income* from real and tangible personal property, such as rents, oil and mining production or royalties, and gains or losses from sales of such property, shall be allocated in accordance with the situs of such property;
>
> b. *income* from intangible personal property, such as interest, dividends, patent or copyright royalties, and gains or losses from sales of such property, shall be allocated in accordance with the domiciliary situs of the taxpayer, except that:

(1) * * *

(2) * * *

c. allowable *deductions* attributable to items separately allocable in subparagraphs a and b hereof, whether or not such items of income were actually received, shall be allocated on the same basis as those items;

d. the amount of any net operating loss deduction *allowed* to a taxpayer *for federal income tax purposes* shall be reduced to an amount which is the same *portion* thereof as the loss from sources within this state (as determined under this section and Section 12 of this act) for the taxable year in which such loss is sustained is of the total loss for such year. (Emphasis supplied) * * * "

Getty reports to Commission on the separate allocation method as opposed to the unitary method.[1] This involves reporting profits and losses from activities in Oklahoma separately from income and losses from its activities outside Oklahoma.

In each of the years 1966 through 1970, Getty sustained losses over and above its net taxable income allocated to Oklahoma. In each of these years this net loss was offset and absorbed at the federal level by gains in other states, so that there was no net operating loss on the federal level for any of these years and thus no losses to carryover onto Getty's 1971 federal income tax return.

Getty claims the authority granted by § 172 of the Internal Revenue Code to carryover and deduct net operating

[1] The unitary method is stated by Getty in its brief as "an arithmetical formula based upon the average percentage obtained by dividing the taxpayer's property, payroll and sales in Oklahoma by its property, payroll and sales everywhere. It is used to allocate net income of a unitary character which cannot be separately allocated based upon the situs of the business activities."

losses from prior years is incorporated into the Oklahoma Tax Act by virtue of 68 O.S.1971 § 2353(3) which states:

"Any term used in this act shall have the same meaning as when used in a comparable context in the Internal Revenue Code, unless a different meaning is clearly required. For all taxable periods covered by this act, the tax status and all elections of all taxpayers covered by this act shall be the same for all purposes material hereto as they are for federal income tax purposes except when this act specifically provides otherwise."

Getty asserts the word "deductions" in 68 O.S.1971 § 2358(A)(3)(c) must include "'carryover deductions" because "carryover deductions" are considered "deductions" by the Internal Revenue Code. Thus subsection (c) is the statutory authority for its claim for the deduction. Getty further submits subsection (d) of 68 O.S.1971 § 2358(A)(3) merely limits the allowed deduction to those losses attributable to activities in Oklahoma. Therefore because no federal net operating loss deduction was claimed on its federal income tax return for 1971, subsection (d) would have no application to Getty.

Commission's interpretation of 68 O.S.1971 § 2358 is quite dissimilar. While agreeing subsection (d) has no application to Getty, Commission believes it does require a taxpayer to have claimed a net operating loss carryover *on his federal tax return for the year in which he claims such type loss on his state tax return*. Because Getty did not show a deduction for carryover losses on its 1971 federal return, it may not now deduct such losses on its Oklahoma return. See 68 O.S.1971 § 2358(A)(3) above cited as emphasized.

Getty's syllogistic logic at first glance appears to have merit. Internal Revenue Code allows net operating loss carryover deductions; Oklahoma has incorporated the Internal Revenue Code into its tax law; therefore Oklahoma

allows net operating loss carryover deductions. However Getty's minor premise must be modified somewhat and expanded to read: Oklahoma has incorporated portions of the Internal Revenue Code into its tax law subject to certain statutory adjustments and limitations.

[1-3] We find no statutory provision in Oklahoma tax law that specifically adopts *all* federally allowed deductions. 68 O.S.1971 § 2353(12) defines "Oklahoma taxable income" as the "taxable income" shown on a taxpayer's federal return. Getty's 1971 federal taxable income did not reflect any deduction for carryover losses. "Taxable income" is the base figure upon which Oklahoma income tax is computed. This base figure is adjusted according to the provisions of 68 O.S. 1971 § 2358. The adjustment authorized by § 2358(A)(3)(d) is directed to the situation where the carryover loss deduction claimed on the federal return included losses from activities in other states. If there is a carryover loss allowed on a taxpayer's federal return, the function of subsection (d) is to limit that figure to that portion attributable to activities carried on in Oklahoma. It was not the intent of the Legislature to create a deduction by this provision, but only to limit one already reflected on the federal return.

[4] Prior to the 1971 act, Oklahoma allowed no carryover loss deductions. By incorporating "federal taxable income" into its new tax code, Oklahoma now permits carryover loss deductions if such deductions are reflected in the amount shown on the federal return as taxable income applying however the limitation of 68 O.S.1971 § 2358(A)(3)(d). If the Legislature had intended to allow a carryover deduction in other situations, it could have provided for such an adjustment. It did not do so.

[5] While we recognize the rule that taxing statutes must be construed in favor of the taxpayer,[2] any change

[2] *Oklahoma Tax Commission* v. *McAfee*, 461 P.2d 602 (Okl. 1969); *C. H. Leavell & Co.* v. *Oklahoma Tax Commission*, 450 P.2d 211 (Okl. 1968).

in the method of computing deductible losses for income tax purposes is within the province of the Legislature and should not be made by the courts. Deductions depend entirely upon legislative grace.[3]

[6] It is agreed that net operating loss carryover deductions are allowed in Oklahoma where a taxpayer is allowed the deduction on his federal return. Getty claims the position advocated by Commission will generate a situation of unconstitutional statutory construction. It asserts allowing a carryover deduction to a taxpayer whose business is operated solely in Oklahoma, but not to a taxpayer who derives part of his income from other states, creates unconstitutionally arbitrary discrimination against non-resident taxpayers in the position of Getty, citing *Graham* v. *State Tax Commission*, 48 A.D.2d 444, 369 N.Y.S.2d 863 (1975). We do not agree. Here we deal with taxable income produced in Oklahoma by *any* taxpayer. The New York case dealt with difference in taxable income between *resident* and *non-resident* taxpayers.

[7] Taxing statutes are frequently discriminatory,[4] but for an income tax classification to be constitutional, all that is required is that the classification and apportionments be reasonable and be related to the object of the tax action.[5] There is no discrimination in Oklahoma against a taxpayer solely because he, like Getty, is a non-resident. Had Getty been a resident of Oklahoma the tax consequences would have been the same.

[8, 9] Getty's argument the tax is an indirect tax on income from sources outside Oklahoma also fails. Although

[3] *Essley* v. *Oklahoma Tax Commission*, 196 Okl. 475, 168 P.2d 111 (1946).

[4] See Dissenting opinion, *Sowders* v. *Oklahoma Tax Commission*, 552 P.2d 700 (Okl. 1976).

[5] *Walker* v. *Oklahoma Tax Commission*, 196 Okl. 207, 164 P.2d 242 (1945); *Sowders* v. *Oklahoma Tax Commission*, id.

the tax may have a direct effect upon the total of Getty's income and thus an indirect effect upon his outside Oklahoma income, a state is not barred from levying an income tax upon income within its boundaries because of its indirect effect upon outside income.[6]

AFFIRMED.

LAVENDER, V. C. J., and DAVISON, WILLIAMS, IRWIN, BERRY and BARNES, JJ., concur.

SIMMS J., concurs in result.

HODGES, C. J., dissents.

SUPPLEMENTAL OPINION ON REHEARING

LAVENDER, Vice Chief Justice:

It has come to our attention that in our opinion of February 1, 1977, we failed to consider the appellant's Proposition VI which was a request for a remittitur of the interest on the additional income tax.

Because of the closeness of that determinative question of law involved, we have decided to allow the request for remittitur of the interest and it is so ordered. *Rogers* v. *Oklahoma Tax Commission*, Okl., 466 P.2d 650; 68 O.S.1971, § 220.

DAVISON, IRWIN, BERRY, BARNES, SIMMS and DOOLIN, JJ., concur.

HODGES, C. J., dissents.

[6] *McCutchan* v. *Oklahoma Tax Commission*, 191 Okl. 578, 132 P.2d 337 (1943).

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

GETTY OIL COMPANY, APPELLANT,	)	
	)	
V.	)	No. 48698
	)	
OKLAHOMA TAX COMMISSION,	)	
	)	
APPELLEE.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that Getty Oil Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Oklahoma, affirming the denial of appellant's formal protest to the assessment by appellee of additional income tax for the taxable year 1971, entered in this action on February 1, 1977, and on Rehearing April 26, 1977.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

s/ Bruce H. Johnson
Bruce H. Johnson
1700 Liberty Tower, 100 Broadway
Oklahoma City, Oklahoma 73102
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 1977, a copy of Appellant's Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid, to Marjorie Patmon, General Counsel, Oklahoma Tax Commis-

sion, M. C. Connors Building, 2501 Lincoln Boulevard, Oklahoma City, Oklahoma 73194, Counsel for Appellee. I further certify that all parties required to be served have been served.

s/ Bruce H. Johnson
Bruce H. Johnson
1700 Liberty Tower, 100 Broadway
Oklahoma City, Oklahoma 73102

Counsel for Appellant

APPENDIX C

PERTINENT PARTS OF THE OKLAHOMA INCOME TAX ACT, 68 O.S. 1971

ARTICLE 23. INCOME TAX

§ 2353. **Definitions.**—For the purpose of, and when used in this article unless the context otherwise requires:

* * * * * *

3. Any term used in this act shall have the same meaning as when used in a comparable context in the Internal Revenue Code, unless a different meaning is clearly required. For all taxable periods covered by this act, the tax status and all elections of all taxpayers covered by this act shall be the same for all purposes material hereto as they are for federal income tax purposes except when this act specifically provides otherwise;

* * * * * *

10. "Taxable income" with respect to any taxpayer means the "taxable income," "life insurance company taxable income," "mutual insurance company taxable income," "(regulated) investment company taxable income," "real estate investment trust taxable income," and "cooperatives' taxable income" and any other "taxable income" as defined in the Internal Revenue Code as applies to such taxpayer or any income of such taxpayer;

11. "Adjusted gross income" means "adjusted gross income" as defined in the Internal Revenue Code;

12. "Oklahoma taxable income" means "taxable income" as reported (or as would have been reported by the taxpayer had a return been filed) to the federal government, and in the event of adjustments thereto by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided;

13. "Oklahoma adjusted gross income" means "adjusted gross income" as reported to the federal government (or as would have been reported by the taxpayer had a return been filed), or in the event of adjustments thereby by the federal government as finally ascertained under the Internal Revenue Code, adjusted further as hereinafter provided; and

* * * * * *

§ 2358. **Adjustments to arrive at Oklahoma taxable income and Oklahoma adjusted gross income.**—A. Taxable income and, where use of adjusted income is necessary (i. e., required by this act), adjusted gross income shall be adjusted as follows to arrive at Oklahoma taxable income and Oklahoma adjusted gross income:

* * * * * *

3. Net income (or loss) from a business activity, which is not a part of business carried on within and without the state of a unitary character, shall be separately allocated to the state in which such activity is conducted. Items of the following nature shall be allocated as indicated:

a. income from real and tangible personal property, such as rents, oil and mining production or royalties, and gains or losses from sales of such property, shall be allocated in accordance with the situs of such property;

b. income from intangible personal property, such as interest, dividends, patent or copyright royalties, and gains or losses from sales of such property, shall be allocated in accordance with the domiciliary situs of the taxpayer, except that:

(1) where such property has acquired a business or commercial situs apart from the domicile of the taxpayer such income shall be allocated in accordance with such business or commercial situs; a trust or an estate shall be treated as having a separate commercial or business situs insofar as undistributed income is concerned, but shall not be treated as having a separate commercial or business situs insofar as distributed income is concerned.

(2) income from such property which is required to be allocated under the provisions of subsection A., 4., hereof shall be allocated as herein provided;

c. allowable deductions attributable to items separately allocable in subparagraphs a and b hereof, whether or not such items of income were actually received, shall be allocated on the same basis as those items;

d. the amount of any net operating loss deduction allowed to a taxpayer for federal income tax purposes shall be reduced to an amount which is the same portion thereof as the loss from sources within this state (as determined under this section and Section 12 of this act)[1] for the taxable year in which such loss is sustained is of the total loss for such year;

* * * * * *

[1] 68 O.S. 1971, § 2362.

APPENDIX D

FILED
SUPREME COURT
STATE OF OKAHOMA
JUL 16 1975
Ross N. Lillard, Jr.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Getty Oil Company, Appellant	)	
v.	)	No. 48698
Oklahoma Tax Commission, Appellee	)	

Petition in Error

The Appellant, Getty Oil Company, a Delaware corporation (herein referred to as "Taxpayer"), being aggrieved and directly affected by Order No. 62195 of the Appellee, Oklahoma Tax Commission (herein referred to as "Tax Commission"), dated June 17, 1975, hereby appeals from such order of the Tax Commission denying the Protest of the Taxpayer to the assessment of additional Oklahoma income taxes for the year 1971 as authorized by Section 225 of Title 68, Oklahoma Statutes (Supp. 1975). All references to statutes herein are to Title 68 of the Oklahoma Statutes unless specified otherwise.

In support of its appeal and in compliance with the Rules of Appellate Procedure in Civil Cases, Taxpayer states:

1. *Tribunal Appealed From and Notice.* The name of the tribunal from which this appeal is taken is the Okla-

homa Tax Commission. Taxpayer filed its Notice of Intention to Appeal with the Tax Commission on June 26, 1975, as required by Section 225(a).

2. *Payment.* Taxpayer paid the additional 1971 income taxes assessed in the amount of $58,064.18 plus interest in the amount of $11,032.19 to the Tax Commission on July 15, 1975.

3. *Style and Number.* The style and number assigned to the case by the Tax Commission are:

In the Matter of the Protest of Getty Oil Company, a Corporation, Against the Assessment of Additional Income Taxes for the Year 1971.	))))))	No. 3681

4. *Description of Order.* Order No. 62195 denied the Protest of the Taxpayer to the assessment of additional income taxes in the amount of $58,064.18 for the year 1971. The Tax Commission determined that Section 2358(A)(3)(d) disallows the deduction by the Taxpayer of its net operating losses incurred in Oklahoma in determining its Oklahoma income tax liability because Taxpayer did not sustain a net operating loss from its operations in all states in determining its federal income tax liability for 1971.

5. *Date Order Rendered.* Order No. 62195 was rendered on June 17, 1975, and mailed to Taxpayer on that date.

6. *Points of Law to be Urged as Error.*

6.1 *Tax Commission Erroneously Construed and Applied Section 2358(A)(3) of the Oklahoma Income Tax Act.* Section 2358(A)(3)(c) allows the net operating loss deduction to Taxpayer who computes its Oklahoma income tax liability on the direct allocation basis (Taxpayer calculates its Oklahoma income tax by deducting its separate

Oklahoma deductions from its separate Oklahoma income); Section 2358(A)(3)(d) is intended to limit the deduction of net operating losses to those actually incurred in Oklahoma or, in the case of a taxpayer who computes its Oklahoma income tax by allocating its income according to the unitary formula, to the amount of the total net operating loss deduction properly allocable to Oklahoma. The construction and application of Section 2358(A)(3) adopted by the Tax Commission is erroneous for the following reasons:

(a) The construction is contrary to the Oklahoma Income Tax Act viewed as a whole.

(b) The construction is inconsistent with Legislative intent and with a logical and reasonable construction of the Oklahoma Income Tax Act and it forever prohibits the deductibility of Taxpayer of its Oklahoma losses.

(c) The construction prevents uniform operation of the Oklahoma Income Tax Act and does not lay the burden of the income tax uniformly on all those similarly situated; therefore, Section 2358(A)(3) arbitrarily discriminates against the Taxpayer and is unconstitutional and void.

(d) The construction incorporates the income of a taxpayer earned outside Oklahoma in calculating Oklahoma income tax on the direct allocation basis and, therefore, results in an unconstitutional indirect tax on the income of such taxpayer earned in another state.

(e) The construction is contrary to established rules of statutory construction which require that any ambiguity in a taxing statute be construed against the State and in favor of the Taxpayer.

6.2 *Interest Remittitur.* Notwithstanding, the error cited above, the Tax Commission failed to assess interest

on the amount of additional income taxes assessed for the year 1971 within the time required by statute. Notice of assessment of interest was made by letter of the Tax Commission dated July 2, 1975. If it is determined that such assessment of interest is authorized by law, Taxpayer was not afforded an opportunity to apply for waiver of such interest in its Protest or at the hearing on the Protest.

7. *Record of Appeal.* Taxpayer received Notice of Completion of Record on July 16, 1975, and filed with this Petition in Error the record of appeal as certified by the Secretary of the Tax Commission.

8. *Relief.*

8.1 *Reversal of Order.* Taxpayer prays for reversal of Order No. 62195 and the refund of the total amount paid ($69,096.37) plus interest as allowed by Section 225(c).

8.2 *Remittitur of Interest.* If the relief prayed for above is denied, Taxpayer prays for the waiver and remittitur of the total amount of interest paid ($11,032.19) as authorized by Section 220(a).

Bruce H. Johnson,
Randall D. Mock and
James H. Holloman, Jr.

Of the Firm:
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Telephone: (405) 232-0661

s/ By Randall D. Mock
Randall D. Mock

Attorneys for Appellant,
Getty Oil Company

Certificate

The undersigned certifies that on July 16, 1975, he filed a true and correct copy of the foregoing Petition in Error with the Oklahoma Tax Commission and with Lester D. Hoyt, General Counsel to the Oklahoma Tax Commission, M. C. Connors Building, 2501 Lincoln Boulevard, Oklahoma City, Oklahoma 73194.

s/ Randall D. Mock
Randall D. Mock

Attorney for Appellant,
Getty Oil Company

APPENDIX E

FILED
SUPREME COURT
STATE OF OKAHOMA
OCT 15 1975
ROSS N. LILLARD, JR.
CLERK

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Getty Oil Company, Appellant,	)	
v.	)	No. 48698
Oklahoma Tax Commission Appellee.	)	

MOTION FOR ORAL ARGUMENT

The Appellant, Getty Oil Company, moves the Court to grant oral argument and states the reason and necessity therefor as follows:

1. The issue presented is whether Appellee erroneously construed and applied Section 2358(A)(3) of Title 68, Oklahoma Statutes (1974 Supp.), in disallowing Appellant's Oklahoma net operating loss carryover deduction.

2. Appellant's position is that: (a) Section 2358(A)(3)(c) allows a taxpayer to deduct its net operating loss resulting solely from its Oklahoma business activities in determining its Oklahoma income tax where no federal net operating loss deduction is reflected on its federal income tax return because of income from sources outside Oklahoma in excess of such losses; and (b) Section 2358(A)(3)(d) simply prohibits the deduction of net operating losses incurred outside Oklahoma.

3. Appellee's position is that Section 2358(A)(3)(d) prohibits the deduction of a net operating loss where no

net operating loss is reflected on the federal income tax returns.

4. The issue is one of first impression in Oklahoma. The only other state court decision on this issue arose in New York and adopted the Appellant's position.

5. The issue is of substantial public significance because the Appellee's interpretation of Section 2358(A)(3) is unconstitutional in its application.

6. Appellant submits that oral argument would be of assistance to the Court in its consideration of the issue presented in this appeal.

WHEREFORE, Appellant prays that the Court grant oral argument in this case.

Dated this 15th day of October, 1975.

CROWE, DUNLEVY, THWEATT,
SWINFORD, JOHNSON & BURDICK

s/ By Randall D. Mock
Randall D. Mock
1700 Liberty Tower
Oklahoma City, Oklahoma 73102
ATTORNEYS FOR APPELLANT

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Motion for Oral Argument was mailed, postage prepaid, this 15 day of October, 1975, to Lester D. Hoyt, General Counsel, Oklahoma Tax Commission, M. C. Connors Building, 2501 Lincoln Boulevard, Oklahoma City, Oklahoma 73194.

s/ Randall D. Mock
Randall D. Mock
Attorney for Appellant,
Getty Oil Company

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Getty Oil Company, Appellant,	)	
v.	)	No. 48,698
Oklahoma Tax Commission, Appellee.	)	

PETITION FOR REHEARING

Taxpayer respectfully submits that this Court has failed to grasp the true import and significance of the authorities cited by Taxpayer in both its Brief-in-Chief and its Reply Brief which strongly support the two propositions hereafter stated.

PROPOSITION I

It was the intent of the Legislature to make the net operating loss deduction in question available to that class of taxpayers of which Appellant is a member; denial of that benefit to Appellant constitutes unreasonable, arbitrary and capricious, and, therefore, invalid action by the Oklahoma Tax Commission.

The decision of the Supreme Court of New York, Appellate Division, in *Graham* v. *State Tax Commission*, 369 N.Y.S.2d 863 (3d Dept. 1975) is directly in point and the holding therein should be applied to the instant facts. This Court is correct in observing that the *Graham* decision involved a non-resident taxpayer. However, the residency status of the taxpayer in *Graham* was not a critical fact in the New York court's consideration of that controversy. The *Graham* court addressed itself to the issue of the man-

ner of application of a net operating loss deduction by way of carryback or carryover to a taxpayer who engaged in business activities in more than one state, who reported its income in the state of the taxing authority on a separate accounting basis, and who only incidentally was a non-resident taxpayer. To find that the status of the residency of the appellant-taxpayer in the *Graham* case was the dispositive fact controlling the New York court's decision would be to subvert and disregard that court's reasoned approach to the controversy before it.

This Court's determination that Taxpayer would be entitled to a net operating loss carryback or carryover deduction only in the fortuitous event that such deduction was reflected in whole or in part on the Taxpayer's federal income tax return is in direct contravention to the holdings of all those other courts which have confronted this very interpretative question. In *Graham* v. *State Tax Commission, supra,* the taxing authority contended that a state income tax statute providing for a net operating loss deduction similar to that provided for by the Oklahoma Legislature in Section 2358(A)(3) should be construed to deny such a deduction to a taxpayer engaged in business activities both within and without the taxing state when the taxpayer's federal income tax return did not reflect an actual net operating loss. This Court's Opinion in the instant matter dated February 1, 1977, endorses that position. However, the New York Supreme Court, Appellate Division, squarely refuted that contention by pointing out the obvious fact that strict conformity between state and federal income tax returns is simply impossible in the case of a taxpayer with income attributable in part to business activities engaged in outside the state for which the tax return is prepared for the reason that the federal return purports to reflect state as well as outside-state income while the state return should theoretically reflect only "those items of income, gain, loss and deduction which are derived from or connected with [state] sources." The New York court

reasoned that the "strict conformity" position of the taxing authority produced a result unintended by the state legislature in which only income was permitted to be allocated by the taxpayer and not losses. In ruling that the interpretation of the statute by the taxing authority was "unreasonable, arbitrary, or capricious, and, therefore, invalid", the New York court observed that, under the construction of the statute adopted by the taxing authority, the taxpayer was compelled to net state gains and losses with outside-state gains and losses, which computation simply ignored the fundamental "statutory mandate" embodied in the separate allocation method of reporting income; that is, for purposes of preparation of the state income tax return, net income from business activities of the taxpayer carried on solely within the state must be reported separate and apart from the taxpayer's net income from its business activities conducted outside the taxing state. The cogent rationale of the *Graham* decision is sufficiently persuasive authority to hold that the Order of the Commission disallowing Taxpayer's Oklahoma operating loss deduction is purely arbitrary and necessarily discriminates against Taxpayer for the patently invidious reason that it elected to conduct its business activities both within and without the State of Oklahoma.

Another case addressing a question of statutory interpretation remarkably similar to the issue confronting this Court in the instant appeal is *In re Avien, Inc.*, 532 F.2d 273 (2d Cir. 1976), promulgated subsequent to the filing of the Reply Brief of Taxpayer. The sole legal issue before the United States Court of Appeals for the Second Circuit was the manner of application of the loss carryback and carryover provisions of New York City's General Corporation Tax, Administrative Code of the City of New York Section R46-2.0(8)(f), which tax is basically patterned after the Internal Revenue Code provisions pertinent to that subject (Section 172). That portion of the Administrative Code pertinent to the instant matter provides as follows:

"'Entire net income' means net income from all sources which shall be *the same as* the taxpayer's federal income . . .

(f) A net operating loss deduction shall be allowed which shall be *the same as* the net operating loss deduction allowed under section one hundred seventy-two of the internal revenue code. . . .

(2) such deductions shall not include any net operating loss sustained during any taxable year in which the taxpayer was not subject to the tax imposed by this part, and (3) such deduction shall not exceed the deduction for the taxable year allowable under section one hundred seventy-two of the internal revenue code. . . ." (Emphasis added.)

In re Avien, Inc., supra, involved an appeal by the taxing authority from an order by the District Court permitting a taxpayer to claim a net operating loss deduction on its New York City tax return. The taxpayer in that case had sustained and reported on its federal tax returns substantial losses in the fiscal years 1963, 1965 and 1966. Losses were also reported on its federal returns for fiscal years 1969 and 1970. However, the taxpayer reported a net taxable income before net operating loss in the fiscal year 1968. Despite the alleged "income", the taxpayer paid no federal taxes in that year because its income was more than offset by the carryforward losses reported on its federal tax returns for the fiscal years 1963, 1965 and 1966.

It was the position of the taxing authority in *In re Avien, Inc.* that under federal law the taxpayer was to first apply its earliest (1963) loss to its 1968 income and that, until that loss was taken, no other yearly losses could properly be considered. However, the taxing authority, having theoretically applied the 1963 loss, then proceeded to claim that the taxpayer was disqualified from taking such a loss because the taxpayer had not been "subject to" the City's General Corporation Tax during fiscal year 1963. The City

argued that its tax was not effective until January 1, 1966, and, therefore, no loss prior to that year could be considered. Thus, the City concluded that the taxpayer had taxable income for fiscal year 1968 for city tax purposes, with no eligible loss deductions to offset that alleged income.

As noted above, the City's tax code provided that net income shall be "the same as" that which was reported on the taxpayer's federal return, and that net operating loss deductions shall also be "the same as" deductions allowed under §172 of the Internal Revenue Code. The taxpayer in *In re Avien, Inc.* conceded that its 1963, 1965 and pre-January 1, 1966, losses were ineligible as carryovers for City tax purposes because of the disqualification provision delineated hereinabove. However the taxpayer maintained that it should be permitted to offset against the 1968 income, for City tax purposes, its post-January 1, 1966, losses as a carryover, as well as 1969 and 1970 losses as carrybacks. This contention was countered by the position of the taxing authority that the reported figures for the respective years on city and federal returns had to be identical to meet the "the same as" mandate of the statute.

In its opinion in *In re Avien, Inc.*, 390 F. Supp. 1335 (E.D. New York 1975), the trial court, noting the absence of any clarifying legislative history relating to the tax law in question, articulated the issue before that court as follows:

"Concededly, the legislature could, if it so desired, deny a * * * taxpayer the benefit of a carryover or carryback loss deduction unless the loss sought to be used as a deduction from City income was the identical loss used as a deduction from federal income. The question here is whether the legislature so intended." 390 F.Supp. at 1339.

The United States Court of Appeals for the Second Circuit expressly construed the "the same as" language of

the tax statute as not to require that the reported figures on the city and federal returns be identical. That Court held that, under the City tax statute in question, "it is not the identity of the loss deduction figures which is required, but rather the identity of permissible computation procedures used to calculate those figures." In a footnote to its opinion, the Second Circuit adopted the holding of the District Court stated as follows:

> "[I]t seems clear that the legislature intended that a * * * taxpayer should be given the same *type of benefit* allowed the federal taxpayers, i.e., an averaging of income *over a period of years during which the tax was in effect.* The reference in §2.0(8) to §172 of the Code is for general guidance and is not so inflexible as to require a non-intended result.
>
> The mere fact, however, that the *reported* figures must be the same does not ipso facto mandate that their *application* be the same * * * If the legislature had intended the strange result intended by the City, it would have used the phrase 'actually taken under Section 172' instead of the phrase 'allowed under section one hundred seventy-two', which it did use." (Emphasis supplied by the Second Circuit.)

The statutory construction of the net operating loss deduction provision of the New York City Administrative Code enunciated by the Second Circuit is entirely consonant with the interpretation of Section 2358(A)(3) articulated in Taxpayer's Brief-in-Chief and Reply Brief. Subsection (c) of Section 2358(A)(3) is the authority for all deductions to be made from income attributable to Oklahoma real property which is separately allocated for Oklahoma income tax purposes. The function of Subsection (d) is one of simple allocation. Subsection (d) is applicable only in that case when a net operating loss deduction is claimed on the taxpayer's federal income tax return. When such a deduction is claimed on the federal return, Subsection (d)

applies to make certain that the taxpayer, in claiming a deduction on its Oklahoma income tax return, allocates only such net operating losses as are attributable to its business activities within Oklahoma. Stated differently, that provision precludes a taxpayer from deducting losses from other states for Oklahoma income tax purposes.

It is the purpose of Section 172 of the Internal Revenue Code in providing for carryback and carryover net operating loss deductions to make available to taxpayers the benefit of income averaging by allowing taxpayers the opportunity to set out on their income tax returns a more accurate and equitable reflection of their true economic gains or losses over a period of years. *In re Avien, Inc.*, 390 F.Supp. 1335, 1339 (E.D. New York 1975). It is this same policy which was intended by the Oklahoma Legislature to be made available to taxpayers with income attributable to business activities within Oklahoma.

If it had intended the result urged by the Commission, the Oklahoma Legislature would have more clearly expressed its intentions with regard to the net operating loss deduction by providing:

> ". . . (d) the amount of any net operating loss deduction *actually claimed by a taxpayer for federal income tax purposes under §172 of the Internal Revenue Code and as reflected upon that taxpayer's federal income tax return. . .*"

Instead, the Legislature elected to draft Subsection (d) in such a manner that it presently serves the simple allocating function explained hereinabove.

The position defended by the Commission might be considered appealing because it would result in a conformity of numerical figures between the federal and state tax returns, i.e., $0, in those instances in which a taxpayer claimed no net operating loss deduction on its federal return; such an instance comprehends the instant situation

in which the Taxpayer suffered net operating losses in Oklahoma during the taxable years 1966-1971 but net income outside Oklahoma during those years absorbed those net losses for federal income tax purposes. However, administratively convenient as such a construction of that statutory provision might be, for the Commission to construe that language in that manner would be to exclude a distinct class of taxpayers from the tax benefit of income averaging intended by our Legislature. The Legislature intended that the practice or procedure of determining a net operating loss deduction for Oklahoma income tax purposes conform to the pattern of federal practice or procedure—not that the numerical figures conform or be identical. See Footnote (9) to *In re Avien, Inc.*, 532 F.2d 273 (2d Cir. 1976), wherein *Graham* v. *State Tax Commission, supra,* is cited as strongly supporting this contention. The Oklahoma enactment is plainly intended to conform operating loss carryback and carryover practices with the pertinent Internal Revenue Code income averaging provision in order to assist businesses with fluctuating incomes. See *Telmar Communications Corp.* v. *State Tax Commission*, 369 N.Y.S. 2d 208 (App. Div., 3d Dept. 1975).

The lonely position of the Commission in requiring "numerical figure conformity" before a net operating loss deduction is allowed directly contravenes the rationale and holdings of every other court which has addressed this issue and by which a published opinion has been disseminated. To construe Section 2358 to mandate "numerical figure conformity" over the "practice conformity" recognized without exception by those other courts not only ignores the explicit language of that Section read in its entirety as it is modified and defined by the pertinent Internal Revenue Code section, but also produces a result which is patently arbitrary in its application to the class of taxpayers of which Appellant is a member. It would deny that class the economic benefits of income averaging intended by the Legislature for the sole and invidious reason that such taxpayers have engaged in business activities outside the State of Oklahoma, have suffered net losses in Oklahoma, but have earned net income outside Oklahoma which net income absorbs and offsets the Oklahoma losses for federal income tax purposes. Certainly the avowed legislative purpose should preponderate over mere administrative convenience.

PROPOSITION II

A remittitur of the interest on the additional income tax assessed should be ordered.

In its Opinion of February 1, 1977, this Court failed to address Appellant's contention that the Tax Commission should be ordered to refund to Appellant the amount of interest accrued and paid on the additional income tax assessed by the Commission, as well as waive any interest which has accrued on that sum since such payment. While the Taxpayer strongly urges the reversal of the Commission's Order because of the reasons and legal authorities cited herein in support of Appellant's Proposition I, if it is ultimately determined that such assessment was authorized by law, the Taxpayer requests that the Court order a remittitur of all interest accrued on the additional income tax assessed.

The conditions precedent to the waiver of interest by the Commission are set forth in Section 220: (a) if the taxpayer's failure to pay the tax is satisfactorily explained to the Commission; or (b) if such failure has resulted from a mistake by the taxpayer of either the law or facts subjecting him to such tax.

The circumstances of this case come within the acceptable reasons for permitting a waiver of interest. However, since no interest was assessed prior to the issuance of the Commission's Order, application for waiver was not made. Very significantly, the Commission did not refute the

power of this Court to order such a remittitur under the instant circumstances.

The Court has held that it is not bound by the rules of Section 220 and that it has the inherent power to order the remittitur notwithstanding the statutory rules regarding the waiver of interest. *Rogers* v. *Oklahoma Tax Commission*, 466 P.2d 650 (1970); *In re Woods Corporation*, 531 P.2d 1381 (Okla. 1975).

CONCLUSION

Based upon the foregoing facts and authorities, Appellant-Taxpayer submits that: (a) Order No. 62195 of the Oklahoma Tax Commission should be reversed for the reason that it is patently arbitrary and discriminatory in its application to that class of taxpayers of which Taxpayer is a member, and therefore denies to Taxpayer due process of law and the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution. All courts which have addressed the interpretative question confronting this Court have reached a reasoned conclusion wholly inconsistent with the finding of law pronounced in this Court's Opinion dated February 1, 1977; and (b) in any event, this Court should waive and the Commission should be ordered to refund to Taxpayer the amount of interest paid on the additional income tax assessed and any interest accrued thereon.

Respectfully submitted,

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February 16, 1977

CERTIFICATE OF SERVICE

I, Bruce H. Johnson, Attorney for Appellant herein, do hereby certify that I have on this 16th day of February, 1977, served a true and correct copy of the above and foregoing Petition for Rehearing on Donald B. Nevard, General Counsel, Oklahoma Tax Commission, M. C. Connors Building, 2501 Lincoln Boulevard, Oklahoma City, Oklahoma 73194, attorney of record for the Appellee herein by depositing same in the United States Mail with postage prepaid.

s/ Bruce H. Johnson
Bruce H. Johnson